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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1942

No. 759

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION (a national banking association),
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR REHEARING ON PETITION FOR CERTIORARI.

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PETITION FOR REHEARING ON PETITION FOR CERTIORARI.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Petitioner Bank of America National Trust and Savings Association respectfully petitions this Court to reconsider its decision on the petition for writ of certiorari filed in this Court on February 23, 1943, and denied on April 19, 1943 and submits the following

grounds for rehearing and granting of the writ, to-wit:[1]

I.

Whether or not banking is commerce is a federal question which ought to be decided by this Court. Denial of the petition for certiorari is not an approval by this Court of the decision of the Circuit Court of Appeals (*U. S. v. Carver* (1923), 260 U. S. 482), but leaves the law in a state of confusion and doubt. We know of no case in which this Court has held that banking is commerce. It is in the public interest and important to petitioner and to all other banks that this Court settle the law.

II.

The power of the States to create and regulate banks under their reserved police powers is threatened by the decision of the Circuit Court of Appeals that banking is commerce and may be regulated by the Congress under its commerce powers. If the Congress may regulate banks under the commerce powers, it may create them under the same powers and exclude the States entirely. The decision raises a federal question, and is not only in conflict with prior decisions of this Court on particular activities of banking, but changes the understanding of the rights and powers of the several States under the Constitution which

[1]Petitioner does not, by omission, concede that other grounds for the writ stated in the petition are not substantial but will limit this petition for reconsideration to matters which it deems most vital, not only to itself and other banks, but in the public interest.

has been accepted for more than a century. If the decision of the Circuit Court of Appeals is good constitutional law, it should be considered and approved by this Court; otherwise it should be reversed.

III.

This Court has held in numerous cases that the power of the Congress to create national banks is related to and implied in the power of the Congress to regulate the fiscal and monetary policies of the Federal Government, and that when they are created under that power such banks are instrumentalities of the United States. It is a federal question whether, as such instrumentalities, they are subject to the National Labor Relations Act.

IV.

The Trial Examiner denied petitioner a subpoena to obtain evidence which it sought for its defense. The Circuit Court of Appeals affirmed the ruling of the Trial Examiner. Whether the ruling of the Trial Examiner was in due process of law is a federal question which this Court should review. The decision of the Circuit Court of Appeals is in conflict with decisions in other Circuits, and should be reviewed on that ground.

ARGUMENT.

1. THE COMMERCE QUESTION.

The first two grounds of this petition relate to the commerce question and we shall treat them together.

The original title of the Act of Congress approved on June 3, 1864, under which petitioner exists and functions was "An Act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof." By an Act approved on June 20, 1874, its title was changed to "The National Bank Act."

Congress did not create the national banks in the exercise of its power to regulate commerce. It conceived that the business of banking by corporate institutions, licensed by its authority and subject to strict regulation and control by the Government, would serve an important public purpose.

M'Culloch v. Maryland, 4 Wheat. 316;

Osborne v. Bank of the United States, 9 Wheat. 738;

Farmers' and Mechanics' Nat'l Bank v. Dearing, 91 U. S. 29;

First National Bank of San Jose v. California, 262 U. S. 366.

In granting and limiting the corporate powers of such banks, it expressly defined its conception of the business of banking in the following terms:

> "Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts,

bills of exchange, and other evidences of debts; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this title. * * *"

U.S.R.S. 5136; 12 U.S.C.A., Sec. 24.

The National Labor Relations Act has not changed the congressional definition of banking nor redefined commerce as an activity which includes banking. Economists refer to money as the "lifeblood of commerce", but banking is, essentially, a balancing of debits and credits and deals with intangibles. Almost every piece of commercial paper used or circulated by a bank, in one way or another, evidences a debt or balances an account, or transfers a debit or a credit. The credit may rest upon money which must be legal tender, but the money itself is rarely moved from place to place and any such movement is only incidental to the business of banking. We know of no case which defines banking as commerce. There are many decisions in which this Court has referred to particular activities of banking as incidental to commerce but not as commerce.

A bank deposit is not earmarked money at all, but evidences that the bank owes the depositor a certain amount of legal tender. The depositor may order machinery from a manufacturer in Chicago. With his order he will forward a check on his local bank. The manufacturer will collect it by deposit in his local bank which will obtain a transfer of the credit. The manufacturer has made or will make the machinery,

in which event it is now held that the act of manufacture affects commerce. The carrier will receive and deliver it to the purchaser who ordered it. The act of transportation is commerce. *But can anyone rationally argue that the bank, in transferring the credit, was engaged in commerce? It dealt with the intangibles which evidenced the transaction and were incidental to the activities which were commerce.*

Each national bank is required by law to do business in a single state and may not have branches in other states. Branches are permitted within the boundaries of the state in which the bank is authorized to do business on a parity with competing state banks. (U.S.R.S. Sections 5190 and 5155.) The head office and principal place of business of petitioner is at San Francisco, California, and it has four hundred and ninety-five branches in other places in California. It has no branches in any other state. Its operations and activities are local and intrastate. It has a representative in the City of New York but his activities are purely promotional. He is a representative of the Business Extension Department. He receives no deposits, makes no loans, maintains no banking facilities. (R. pp. 407, 408, 488.) The law does not permit him to do so.

National banks are permitted by law, under certain restrictions and conditions, to establish branches in foreign countries or dependencies or insular possessions of the United States for the furtherance of the foreign commerce of the United States, *and to act if required to do so as fiscal agents of the United States.*

(Title 12, U.S.C.A., Section 601, Fed. Res. Act, Section 25, pars. 1-5.) In "furtherance of" means in "aid of" but does not necessarily mean commerce. As will be seen the aid is incidental to the commerce.

Petitioner has a branch in London, England. The London branch accepts deposits and makes loans. In 1937, the net profit of the London branch was $3711.08. For the same year petitioner's net earnings from the whole system amounted to $13,280,851.41. In 1938, petitioner's London branch had a net profit of $38,-164.17, which included recoveries of $27,692.81, the major portion of which was a refund of taxes paid to the British Government in a previous year. The net operating income of the London branch, exclusive of recoveries, for that year was $10,471.36. For the same year respondent's entire net earnings amounted to $15,729,608.44. (R. pp. 1280-1284.)

On December 31, 1937, the London branch had total deposit liabilities of $5,300,548.78. On December 31, 1938, the London branch had total deposit liabilities of $4,083,381.55. (R. p. 1281.) On the same dates petitioner's total deposit liabilities in all its branches were $1,300,000,000.00 and $1,400,000,000.00, respectively. (R. p. 1289.) The London branch does approximately one-third of one per cent of petitioner's total business. There is no showing or evidence in the record that the London branch or its activities have any substantial relation to or effect upon the foreign commerce of the United States.

Petitioner is a large holder of obligations of the United States. On December 31, 1938, its holdings of

government bonds and treasury obligations amounted to $345,464,15.00. (R. p. 433.) Its purchases of short-term offerings of the Treasury Department are usually made through the Federal Reserve Bank in New York City. Delivery is made by the Federal Reserve Bank and is an activity of that agency of the United States. (R. p. 481.) Petitioner's purchases and sales of general obligations of the United States are usually made through brokers in New York, several of whom have offices in San Francisco. (R. p. 433.) We challenge any argument that dealings in obligations of the United States bear any relation to, or constitute commerce in any sense. Such dealings further one of the purposes for which national banks were created—to aid the fiscal policies of the Government.

Petitioner, as the law requires, is a member of the Federal Reserve System. On December 31, 1937, it had on deposit $151,019,313.04 and on December 31, 1938, $148,267,594.07 with the Federal Reserve Bank. On the same dates it had on deposit $23,304,090.06 and $56,568,044.54, respectively, in banks located in other states. (R. p. 443.) On the same dates it had on deposit $1,482,394.97 and $1,112,358.50, respectively, in banks located in foreign countries. (R. p. 444.)

Checks on other banks deposited with petitioner in San Francisco and Los Angeles are delivered to the Federal Reserve Bank in those places for collection. (R. p. 446.) Checks on out of state banks are likewise in the main collected through the Federal Reserve Bank. (R. p. 446.) The Federal Reserve Banks operate a wire transfer system which is based upon a

settlement fund maintained with the Federal Reserve Bank in New York by the several regional Reserve Banks. When a request for a transfer of funds is made of a Federal Reserve Bank, that bank telegraphs to the Federal Reserve Bank nearest to the point of payment and asks it to effect the payment. When payment is effected, the Federal Reserve Bank at the point of payment advises the Federal Reserve Bank of New York, which, by appropriate entries upon its books, charges and credits the other Federal Reserve Banks which participated in handling the collection and they in turn charge or credit the banks for which the funds were transferred. (R. p. 454.) It is thus apparent that a large part of the business of all member banks, including petitioner, is handled through the Federal Reserve System which is an instrumentality of the United States. While this fact bears upon the instrumentality question, it also negatives the contention of the Board that banks are engaged in commerce.

Petitioner is authorized by law to do business as a corporate trustee in the State of California. It has a trust department which acts as administrator, executor and guardian under appointment of the Courts of California. (R. p. 469.) It also acts as trustee under private appointments. It has a corporate trust division and acts as trustee for bondholders and other issuers of securities secured by real estate and other property. It also acts as registrar and transfer agent for issues of corporate securities. By far the larger number of its appointments in any of said capacities are by persons and for corporations domiciled in California. (R. p. 470.)

In performing its trust functions it acts in a representative capacity. Its trust department is a service department. Private individuals may act in the same capacity and perform the same service. It requires imagination to find in the activities of its trust department anything which affects, or the obstruction of which, would burden commerce.

Of course, petitioner in the business of banking makes loans to the agricultural industry, to individuals for personal use and to small merchants in the state. Its average loan amounts to $1700.00 and its loans are distributed far and wide in all of its branches in California. (R. pp. 428-429.) It makes loans to qualified brokers, to the petroleum industry, to the motion picture industry, to the food-canning and processing industry, to the mining industry, to the clothing industry, to manufacturers of transportation equipment, to newspapers and to publishing concerns. Substantially all such loans are made in California and are purely intrastate. The promise of their repayment is evidenced by promissory notes or choses in action. (R. pp. 404, 474, 1290.) It has no branches in other states where it may make or hold loans. If it lends money to a borrower domiciled in another state, the borrower usually receives the proceeds of the loan or it is credited to his account in California, or the credit is transferred to him through another bank.

Petitioner's loan portfolio at the time of the hearing was approximately $700,000,000.00, of which slightly less than one-half constituted loans on real

estate in California. (R. p. 1293.) Lending on the security of real estate in California, or for that matter in any other state, is not commerce in any sense.

Petitioner deals in acceptances. An acceptance is a draft or bill of exchange which has been accepted by a drawee. The incidents and the effect of an acceptance are stated in Brannan's Negotiable Instruments Law (Sixth Edition), Section 132, as follows:

> "Sec. 132. Acceptance—How Made, etc.
>
> The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. *It must not express that the drawee will perform his promise by any other means than the payment of money.*" (Emphasis supplied.)

It is a form of instrument by which money or credit is transferred from one person to another. Its use in some form is as old as the Law Merchant. When accepted by the drawee, it becomes the drawee's obligation to pay money and may be bought and sold as any evidence of debt. It may be used to pay for merchandise or property which will never enter the channels of trade or commerce. It may be accompanied by and used to pay for bills of lading for goods and merchandise to be transported in interstate and foreign commerce. Its use is only incidental to the production or transportation of the merchandise.

If merchandise is shipped to a purchaser in California, the bank may receive from the shipper a bill of lading to be delivered to a buyer, who is a customer

of the bank, upon payment of an attached draft or bill of exchange or upon the acceptance thereof. If the buyer has established his credit with the drawee bank, it may receive the bill of exchange and charge the amount to be collected for it to its customer's account, and deliver the bill of lading to the customer who is the purchaser of the goods. If the draft is forwarded with the bill of lading by a bank in another state or country, upon advice of the acceptance, the forwarding bank may pay the shipper for the goods and the two banks will settle the obligation evidenced by the acceptance between themselves in due course of their business.

The draft or the acceptance evidences merely a money or credit transaction between the banks and their customers. The bill of lading, which is a symbol for the merchandise, is an instrument in which the banks are not interested or in respect of which they act as agents only. It is a thing apart from the draft by which the money or credit is to be transferred. The draft or the acceptance and the transfer of money is only incidental to the sale or transportation of the merchandise, which is or may be commerce. It is important to keep in mind that whenever a bank has any interest in a bill of lading it is usually as security for a loan or credit to a consignor or consignee.

It frequently happens that a draft or bill of exchange accompanied by a bill of lading is not presented to the drawee bank for acceptance or collection until the merchandise represented by the bill of lading has reached its destination. The merchandise has then

finished its journey in commerce and payment or acceptance of the draft may not then be even an incident of commerce.

The Board relies on evidence (R. p. 415) that petitioner on December 31, 1937, held over $1,000,000.00 worth of commercial paper payable outside the state. Such commercial paper was in the form of promissory notes. Such paper represented slightly more than one-seventh of one per cent of respondent's loan portfolio on that date. There is no evidence that such notes had any relation to commerce. They are evidences of debt and nothing else. If holding them was commerce, then anyone who holds a promissory note payable in another state is engaged in commerce and subject to the Act.

Petitioner issues or sells to its customers letters of credit and traveler's cheques. (R. pp. 467, 468.) Such paper is evidence that the holder has established a credit with the issuing banks, which will repay funds advanced against or paid for the paper. The bank which advances funds against the letter of credit will charge the account of the issuing bank or draw upon the issuing bank to repay the funds advanced. The issuing bank may not know for what purpose the credit is to be used. It is immaterial whether it does or not. The credit may be used in aid of commerce, but the act of the bank in extending it is merely incidental. The letter of credit is a contract between the issuing bank and its customer and the bank that honors the credit. The issuing and the paying banks play no part in any act which constitutes commerce although

the customer who uses the credit may be actually engaged in commerce or in the production of goods for commerce or he may use the credit to buy a farm in Iowa, or to pay for meals in a New York hotel.

In *Hopkins v. U. S.*, 171 U. S. 578, 43 L. ed. 290, this Court said:

> "Many agreements suggest themselves which relate only to facilities furnished commerce, or else touch it only in an indirect way, while possibly enhancing the cost of transacting the business, and which at the same time we would not think of as agreements in restraint of interstate trade or commerce. They are agreements which in their effect operate in furtherance and in aid of commerce by providing for it facilities, conveniences, privileges, or services, but which do not directly relate to charges for its transportation, nor to any other form of interstate commerce."

In *Nathan v. Louisiana*, 8 Howard 73, 12 L. ed. 992, this Court considered whether a state could tax the business of a money and exchange broker whose sole activity was negotiating and effecting for others, for a commission, the purchase and sale of exchange on other states and foreign countries. This Court said:

> "As an exchange broker, the defendant had a right to deal in every description of paper, and in every kind of money; but it seems his business was limited to foreign bills of exchange. Money is admitted to be an instrument of commerce, and so is a bill of exchange; and upon this ground, it is insisted that a tax upon an exchange broker is a tax upon the instruments of commerce. * * *
>
> "A bill of exchange is neither an export nor an import. It is not transmitted through the ordi-

nary channels of commerce, but through the mail. It is a note merely ordering the payment of money, which may be negotiated by indorsement, and the liability of the names that are on it depends upon certain acts to be done by the holder, when it becomes payable.

"The dealer in bills of exchange requires capital and credit. He generally draws the instrument, or it is drawn at his instance, when he is desirous of purchasing it. The bill is worth more or less, as the rate of exchange shall be between the places where it is drawn and where it is made payable. This rate is principally regulated by the expense of transporting the specie from the one place to the other, influenced somewhat by the demand and supply of specie. Now, the individual who uses his money and credit in buying and selling bills of exchange, and who thereby realizes a profit, may be taxed by a State in proportion to his income, as other persons are taxed, or in the form of a license. He is not engaged in commerce, but in supplying an instrument of commerce. He is less connected with it than the ship builder, without whose labor foreign commerce could not be carried on."

In *Hemphill v. Orloff* (1928), 277 U. S. 537, 72 L. ed. 978, 984, Mr. Justice McReynolds, speaking for this Court, said:

"Upon the facts disclosed, the court below held the Trust was carrying on the business of dealing in negotiable notes within the state of Michigan; and we find no reason for rejecting that conclusion. Such business is not interstate commerce. Nathan v. Louisiana, 8 How. 73, 12 L. ed. 992; Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357;"

It is no answer to the principle stated in this case to say that the same transactions, if conducted by a bank, are of a different character because they are not taxable by the states. The national banks may not be taxed by the states except as permitted by Congress because they are agencies or instrumentalities of the United States. (*M'Culloch v. Maryland,* 4 Wheat. 316, 4 L. ed. 579.) Congress now permits and at the same time limits the character and amount of such taxation (Sec. 5219, U. S. R. S.), but the tax is on the business or income or shares of the banks, and not on an instrumentality of commerce.

It is well settled that the insurance business—life, accident or liability—does not constitute interstate commerce, *or commerce at all.* In the case of *Paul v. Virginia,* 8 Wall. 168, 19 L. ed. 357, Paul, a resident of Virginia, was appointed agent for several New York insurance companies. He failed to comply with the Virginia law requiring a deposit of bonds with the treasurer of the state, and was indicted and convicted. He appealed, contending that the law violated the commerce clause of the Federal Constitution. Mr. Justice Field, writing the opinion of this Court, declared:

> "Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent

of the parties to them. They are not commodities to be shipped or forwarded from one state to another, and then put up for sale. *They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration.* Such contracts are not interstate transactions, though the parties may be domiciled in different states. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. *They do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce."* (Emphasis supplied.)

In the later case of *New York Life Ins. Co. v. Deer Lodge County,* 231 U. S. 495, 58 L. ed. 332, involving the constitutionality of a statute of Montana imposing certain taxes on insurance companies, *Paul v. Virginia* was declared to be the progenitor and controlling case. Mr. Justice McKenna, after reviewing the authorities, held:

"It was also urged that modern life insurance had taken on essentially a national and international character, and that when Paul v. Virginia was decided the business was 'to a great extent local; that is, conducted through the domestic contracts by stock companies. The great and commanding organizations of the present day had hardly begun the amazing developments which have made them the greatest associations of administrative trusts of the business world'.

> "These contentions were earnestly made; the reply to them deliberately meditated and its extent fully appreciated. The ruling in Paul v. Virginia and other cases was applied. We omitted the reasoning by which they demonstrated, we said, the correctness of their conclusion. We, however, repeated that the business of insurance is not commerce. *The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse,* and in this respect there is no difference whatever between insurance against fire and insurance against the 'perils of the sea', and, we added, that 'against the uncertainty of man's mortality'." (Emphasis supplied.)

This principle is reaffirmed in the following cases: *Ducat v. Chicago,* 10 Wall. 410, 19 L. ed. 972; *Liverpool Ins. Co. v. Oliver,* 10 Wall. 566, 19 L. ed. 1029; *Fire Ass'n v. New York,* 119 U. S. 110, 30 L. ed. 342; *Hooper v. California,* 155 U. S. 648, 39 L. ed. 297; *Noble v. Mitchell,* 164 U. S. 367, 41 L. ed. 472; *N. Y. Life Ins. Co. v. Cravens,* 178 U. S. 389, 44 L. ed. 1116; *Nutting v. Massachusetts,* 183 U. S. 553, 46 L. ed. 324; *Nat. Union Fire Ins. Co. v. Wanberg,* 260 U. S. 71, 67 L. ed. 136; *Bothwell v. Buckbee, Mears Co.* (1927), 275 U. S. 274, 72 L. ed. 277; *Metropolitan Casualty Co. v. Brownell* (1934), 68 Fed. (2d) 481.

In *Standard Home Co. v. Davis,* 217 Fed. 904, plaintiff company was engaged in the sale of investment home purchasing contracts and in lending money in various states. An Arkansas Act imposed a fee on foreign investment companies. On the question of the relation of the business of the defendant to interstate commerce, the Court held that the com-

pany offered nothing for sale; that it was purely an investment company, and that it was no more involved in commerce than were insurance companies. The Court further stated:

> "Nor are loans of money made to clients for the purpose of enabling them to acquire homes commerce, within the meaning of the commerce clause. * * *"

and cited with approval the cases of *Nelms v. Mortgage Co.*, 92 Ala. 157, 9 So. 141; *Southern Bldg. and Loan Assoc. v. Norman*, 98 Ky. 294, 32 S. W. 952.

Graniteville Mfg. Co. v. Query, 44 Fed. (2d) 64 (affirmed 283 U. S. 376, 75 L. ed. 1126), involved a state stamp tax on promissory notes. The manufacturing corporation executed promissory notes payable to banks and banking houses outside the state. The company argued that the tax on the notes payable outside the state was invalid as a burden on interstate commerce. The tax was held valid as not being a burden on interstate commerce, but simply a tax levied in relation to an act done within the state, namely, the execution of an instrument. The Court said:

> "The plaintiff contends also that the laying of the tax in question is a burden upon interstate commerce. But under the decisions of the Supreme Court *it is plain that the notes in question did not constitute interstate commerce. They are mere personal contracts. The making of such a contract is a mere incident of commercial intercourse, and sending the notes by mail or otherwise from one state to another does not constitute interstate commerce.* See New York Life Ins. Co.

v. Deer Lodge County, 231 U. S. 495, 34 S. Ct. 167, 58 L. Ed. 332, where the subject is fully discussed and the decisions reviewed." (Emphasis supplied.)

Engel v. O'Malley, decided by this Court and reported in 219 U. S. 128, 55 L. ed. 128 (1910), involved the constitutionality of a New York statute requiring that a license be obtained from the state comptroller by individuals or partnerships desiring to engage in the business of receiving deposits of money for safekeeping or for the purpose of transmission to another, or for any other purpose. The respondent refused to take out a license on the ground that the state statute was an attempt to regulate interstate commerce, and therefore was void. The state urged that there was nothing in the legislation which came within the purview of the commerce clause but that, on the contrary, it was a legitimate exercise of the police powers. It was argued that at the most banking was a mere incident of commerce which could be regulated by the state under its police powers. In holding that the commerce clause of the Constitution was not infringed, Mr. Justice Holmes said:

"* * * When, as in this matter the Constitution takes from the states only a portion of their otherwise absolute control, there may be expected difficulties in drawing the dividing line, because where it shall be put is a question of more or less. The trouble is inherent in the situation, but it is the same in kind that meets us everywhere else in the law. The question is whether the state law creates a direct burden upon what it is for Congress to control, and the facts of specific case

must be weighed. In doing so we recur to what we have said above,—*that we cannot regard the statement of the plaintiff's business in his bill as describing the receipt of bailments for the transmission of the identical objects received to other states. Neither do we regard the law as having had such bailments primarily in mind.* Under the statement in the bill and the words of the law, *we must take it that the money received even when received for transmission, becomes the money of the depositary, and his obligation that of a debtor under contract to pay as may be directed.*" (Emphasis supplied.)

In its decision affirming the findings and conclusions of the Board that the activities and business of petitioner constitute commerce within the meaning and intent of the Act, the Circuit Court of Appeals has decided, in effect, that banking and its activities constitute commerce among the several states and with foreign countries within the meaning and intent of Article I, Section 8 (3) of the Constitution of the United States. *The decision fails to distinguish activities which directly constitute commerce, or which directly burden and affect commerce, from activities which only affect commerce incidentally, or not at all.*

The effect of the decision, if it becomes final, will be to confirm in Congress the exclusive power under the commerce clause of the Constitution, whenever it so elects, to license and regulate all banking, and to exclude the several states from their sovereign right, in the exercise of their police powers, to permit and regulate banking under state laws. If the decision is sound law it will have deep and far-reaching effects

upon the future course of banking and the financial policies of the United States.

Consideration of the commerce question by the Circuit Court of Appeals is inadequate. It is an acceptance of the conclusions of the Board and confuses the incidents of banking with the objects of commerce. It is contrary to all prior pronouncements of this Court that many transactions and activities which are common to all banking affect commerce incidentally but are not in themselves commerce; that money, in terms of which banking is transacted, is not a commodity of commerce.

The subject of banking is money. It is not a commodity of commerce. It is a medium of exchange and its use is universal in all human activities. If its use in commerce by one who owns it or by those who borrow it, subjects the owner or the lender to regulation under the commerce powers in the Constitution, then we must search fruitlessly for any activities which may not be so regulated. In *N. L. R. B. v. Idaho-Maryland Mine Corporation,* 98 Fed. (2d) 129 (1938), the Circuit Court of Appeals in the Ninth Circuit noted the effect of so holding in the following terse statement:

> "The Board asserts, without proof, that respondent's production of gold is 'the production of that upon which not only domestic but world trade is based and secured;' that 'Interstate and foreign commerce being so vitally dependent upon and so delicately adjusted to gold, necessarily the supply of gold critically affects that commerce'; and that respondent's production of gold 'consti-

tutes the very life-blood of commerce, any interference with which would have drastic repercussions in interstate and foreign commerce'.

"On the basis of these unproved and, we think, unprovable assertions, the Board asks us to hold the National Labor Relations Act applicable to respondent. *This we decline to do. Jurisdiction of respondent's labor relations cannot be predicated upon the fact that it happens to be a producer of a metal which, in former times, was used as money, and which, in this country, still bears some relation to money. If that were sufficient to confer jurisdiction, every employer who pays wages, buys goods or spends money for any purpose—in other words, all employers—would be subject to the act, which manifestly is not the case.*" (Emphasis supplied.)

In *Padgett v. Gulfport Fertilizer Co.* (1914), 11 Ala. App. 366, 66 So. 866, 870, the Court said:

"Money, unlike commercial fertilizers, is not an article of commerce, but is merely a medium of exchange, *and the loaning of it by a foreign corporation to a resident of this state does not, like a sale of articles of commerce, constitute interstate commerce, or fall within the protective provisions of the commerce clause of the federal constitution.*" (Emphasis supplied.)

Money does not grow from the ground like crops. It is not processed for sale and is not transported to be worn or consumed. It is not produced like gas or electricity to drive the wheels of commerce and industry. It is not gathered like news to be sent from place to place to be printed in newspapers and books.

All of these things are tangible. Money is intangible. It is a token or symbol of values. Its value is fixed by law. Unless it is legal tender it has no value.

The Board argued that the use of money is commerce because it affects commerce. The weather affects commerce as it produces or retards crops. Political policies affect commerce; tariffs and taxes encourage or retard its flow. Governments may increase or decrease the value of money and that affects commerce. So many things affect commerce that the mind becomes confused in trying to think of them all. Commerce is realistic and its objects are tangible.

The Act with which we are dealing limits its application to things which are commerce or which affect commerce by burdening or obstructing it. Sec. 2(7) of the Act obviously asserts all of the power of Congress under the commerce clause of the Constitution.

We find light on the wording and intent of the Act in House of Representatives Report No. 1147, 74th Congress, First Session (1935). We quote from the report at page 10:

> "The definitions in subsections 6 and 7 are intended as the basic jurisdictional definitions as used in their appropriate setting in Sections 9 and 10. *The bill is based squarely on the power of Congress to regulate commerce among the several states and with foreign nations.* It does not apply to controversies or practices of purely local significance, which do not presently or potentially burden or obstruct the free flow of such commerce.
>
> "The Committee Amendment to subsection 6 narrows the definition of interstate commerce by not

making it extend to transportation or communication that is merely 'related to' interstate commerce. *This change has been made in view of the doubts that the Schechter Case casts upon the validity of regulating practices that are merely 'related to' or 'indirectly' interstate commerce.*

"The new definition inserted by the Committee Amendment to *subsection 7 also helps to confine the bill to the proper sphere under the Schechter decision by removing from its purview practices which merely 'affect' interstate commerce. Under this Amendment the bill is confined to practices 'burdening or obstructing' interstate commerce.* These words have received repeated recognition in court decisions as fit bases for Federal jurisdiction." (Emphasis supplied.)

In *Schechter v. United States,* 295 U. S. 495, 79 L. ed. 1570, this Court, in a unanimous opinion, written by Chief Justice Hughes, said:

"In determining how far the Federal Government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. The precise line can be drawn only as individual cases arise, but the distinction is clear in principle * * * If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the Federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the Federal Government."

If money is not a commodity of commerce, the use of checks and other so-called commercial instruments is not commerce. The mere fact that mails or other means of communication are used in connection with a business activity does not make such use interstate commerce if the articles for which the facilities are used are not commodities of commerce.

U. S. Fidelity and Guaranty Co. v. Kentucky, 231 U. S. 394, 58 L. ed. 283;

Hemphill v. Orloff, 277 U. S. 537, 72 L. ed. 978;

Ware v. Mobile County, 209 U. S. 405, 52 L. ed. 855;

Nathan v. Louisiana, 8 How. 73, 12 L. ed. 992;

Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357;

New York Life Ins. Co. v. Deer Lodge County, 231 U. S. 495, 58 L. ed. 332.

This Court has affirmed the power of the states to create and regulate banks.

Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112;

Shallenberger v. First State Bank, 219 U. S. 104, 55 L. ed. 117;

Assaria State Bank v. Dolley, 219 U. S. 121, 55 L. ed. 123.

The states, since the decision of this court in *M'Culloch v. Maryland,* supra, and the decision in *Farmers' and Mechanics' Nat'l Bank v. Dearing,* supra, which upheld the present national banking system, have licensed and regulated state banks in competition with the national banks. They have done so in reliance on their reserved police powers and in com-

plete confidence in the decisions of this Court which found authority for creation of the national banks in Article I, Section 8(18) of the Constitution as federal agencies necessary and appropriate to aid and support the monetary and fiscal policies of the Federal Government.

The great state banks now in existence are active competitors of the national banks. One of them in New York City is a larger bank than petitioner. The rivalry is good for business and is in the public interest.

If it is now held that banking is commerce, or that by its effect upon commerce it may be regulated in any of its activities under the commerce clause of the Constitution, then all of its activities may be so regulated, and Congress may, when it deems the time appropriate, take complete control of all banking.

The states will then be excluded from one of the most important of their remaining powers. The social and economic effects of such a change will be profound and far reaching.

The question is strictly federal in character. In the public interest as well as in the interest of banking a writ of certiorari should be granted in this case so that the question may be settled now.

2. THE INSTRUMENTALITY QUESTION.

While the petition for certiorari was pending in this case and before its denial by this Court, the Court of Appeals of Kentucky handed down a decision reaffirming the law, as it has so many times been stated by this Court, that national banks, as instrumentalities of the United States, are not subject to taxation by the States, except as Congress may permit. We refer to the case entitled *Barnes v. Anderson National Bank,* and companion cases, decided by the Kentucky Court of Appeals on March 16, 1943, and reported in ..... Southwestern Reporter at page ..... The cases involved the power of the State of Kentucky to tax national banks, state banks which were members of the Federal Reserve System, and other corporate employers under its Unemployment Compensation Act of 1938. The first Act of 1936 exempted instrumentalities of the United States from its provisions and the Act of 1938, amended in 1940, omitted the exemption.

We refer only to that part of the decision which relates to national banks. The decision contains such an excellent statement of the federal character of national banks that we believe it will be helpful to quote from it at length. On the instrumentality question the Kentucky Court said:

> "Counsel for the Commission contends that national banks are private corporations operated primarily for private profit and therefore cannot be deemed to be instrumentalities of the federal government. He argues that the opinion of Chief Justice Marshall in M'Culloch v. Maryland, 4 Wheat. 316, has been misinterpreted in a great number of Supreme Court cases following the

rendition of that opinion. The controversy in that action concerned the right of the state of Maryland to impose a tax on the Bank of the United States in the exercise of the right granted to it by Congress to issue bank notes. It was held that in issuing the notes the bank was exercising a governmental function and the operation was immune from taxation. The Court additionally reasoned that since the provisions of the act were confined to the banks not chartered under the laws of Maryland, the tax was discriminatory. The decision in that case went no further than the recitation above; but, with that as a commencement, the trend of judicial thought developed into the conclusion that national banks (apparently in all of their functions) are to be considered to be instrumentalities of the government, and, by reason of that fact, the states are without power to tax them in any respect, unless consent first shall have been obtained from the Congress of the United States.

"In Osborne v. The President etc., 9 Wheat. 738, in an opinion by Chief Justice Marshall, the Court said:

> " 'The whole opinion of the court in the case of M'Culloch v. Maryland is founded on and sustained by the idea that the bank is an instrument which is necessary and proper for carrying into effect the powers vested in the Government of the United States.'

"In both M'Culloch v. Maryland and Osborne v. The President, the bank involved was the second National Bank of the United States, which was partially owned by the United States Government. It was not until the year 1864, that Congress passed the first National Banking Act, which as

amended, is now in force. Whereas, previous to that time there had been only two national banks, after the passage of the act of 1864 many sprang into existence. The Supreme Court construed the Act of 1864 in Farmers and Mechanics National Bank v. Dearing, 91 U. S. 29, wherein it was held,

> " 'The constitutionality of the act of 1864 is not questioned. It rests on the same principle as the act creating the second Bank of the United States. The reasoning of Secretary Hamilton and of this Court in M'Culloch v. Maryland (4 Wheat. 316), and in Osborne v. The Bank of the United States (9 id. 708), therefore, applies. The national banks organized under the act are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end. Of the degree of the necessity which existed for creating them Congress is the sole Judge.'

"In Davis v. Elmira Savings Bank, 161 U. S. 275, which was cited with approval in Owensboro National Bank v. Owensboro, 173 U. S. 664, the court said:

> " 'National Banks are instrumentalities of the Federal Government, created for a public purpose, and, as such, necessarily subject to the paramount authority of the United States. * * * It follows then necessarily from these conclusions, that the respective States would be wholly without power to levy any tax either direct or indirect, upon the national banks, their property, assets or franchises, were it not for the permissive legislation of Congress.'

"In First National Bank v. Anderson, 269 U. S. 341, it was held:

"'National banks are not merely private moneyed institutions, but agencies of the United States created under its laws to promote the fiscal policies; and hence the banks, their property and their shares cannot be taxed under state authority except as Congress consents and then only in conformity with the restrictions attached to its consent.'

"Counsel for the Commission admit the existence of the opinions above cited but insist that the more recent decisions of the Supreme Court have a tendency to depart from the rule established. But we are of the opinion that he is in error in this respect. On April 22, 1940, in an opinion prepared and delivered by Mr. Justice Reed of Kentucky, the Supreme Court said:

"'* * * Congress may intervene to protect its instrumentalities (national banks) from any other tax which threatens their usefulness.'

Colorado National Bank of Denver v. Bedford, 84 L. ed. 730, 310 U. S. 41. By any other tax the court referred to any tax other than the ones Congress permits the states to levy. As recently as March 1, 1943, an opinion was rendered by the Supreme Court under the style of Maricopa County v. Valley National Bank of Phoenix (no further citation of this case can be given because it has been so recently decided as not yet to have been published in the advance sheets). The Valley National Bank sued Maricopa County, its treasurer, and its tax collector to restrain the collection of state, county, school district, and municipal taxes on its shares owned by the Reconstruction Finance Corporation for the years 1935 and 1936. The opinion pointed out that prior to March 9, 1933, national banks were not authorized to issue

preferred shares, but, on that date, they were given authority and the Reconstruction Finance Corporation was authorized to subscribe therefor. In pursuance of that authority the bank issued to Reconstruction Finance Corporation certain shares valued at $1,240,000 at par. When the shares were acquired by the Reconstruction Finance Corporation the act of Congress permitting real estate and bank shares to be taxed by states was in effect. Section 5219, Revised Statutes. Previous to March 20, 1936, the Supreme Court held that preferred shares of national banks held by the Reconstruction Finance Corporation were subject to taxation by reason of the consent given by Congress in Section 5219, supra. Baltimore National Bank v. State Tax Commission, 279 U. S. 209. On March 20, 1936, Congress enacted a statute providing that shares of preferred stock of national banks theretofore and thereafter acquired by the Reconstruction Finance Corporation shall not be the subject of taxation, as long as owned by the Corporation. 49 Stats. 1185, 12 U. S. C., section 51d. On the authority of that act, the district court issued a permanent injunction against the collection of the taxes. Judgment was affirmed by the Circuit Court of Appeals. Certiorari was granted because of the public importance of the question raised. In affirming the decision of the Circuit Court the Supreme Court said:

"'Little need be said in answer to the argument that the Act violated the Tenth Amendment. The authority by which the taxes in question were levied did not stem from the powers "reserved to the States" under the Tenth Amendment. It was conferred by Congress which has under the Constitution exclusive au-

thority to determine whether and to what extent its instrumentalities, such as the Reconstruction Finance Corporation, shall be immune from state taxation.'

There follows citation of authorities, and the opinion resumes:

" 'Hence when Congress withdrew the privilege which it had previously granted, it was not curtailing any political power which the Constitution had reserved to Arizona.'

The opinion then cites Owensboro National Bank v. Owensboro, supra. Thus it will be seen, that within three years last past the Supreme Court has reaffirmed its determination that national banks are instrumentalities of the United States and within two weeks last past it has reaffirmed its determination that Congress has, under the Constitution, exclusive authority to determine whether and to what extent its instrumentalities shall be immune from state taxation. These decisions have been adhered to by the vast majority of courts of last resort. In respectful regard of those authorities, this court arrived at a like decision in City of Shelbyville v. Citizens Bank of Shelbyville, 272 Ky. 559, 114 S. W. (2d) 719, wherein it was said:

" 'That neither a state nor a subdivision thereof can impose a license or franchise tax on a national bank is firmly established by decisions of the Supreme Court of the United States. * * * National Banks were first established by Congress in 1864, and by an act passed in 1868, Congress granted a qualified permission to the states to tax them. This act, with slight changes, has continued in force to the present time, and is now section 5219, U. S. Rev. Stats., as amended, U. S. C. A. title 12, section 548.'

> "Thus, it will be seen, the judicial construction of the question is to the effect, not only that instrumentalities of the United States are not subject to taxation by the individual states except by the consent of Congress, but also, that national banks are such instrumentalities."

By Section 2(2) of the National Labor Relations Act, the United States is not an employer subject to the Act. The exemption of the United States in an abstract or sovereign sense means nothing. The exemption means the departments and agencies by which the United States performs its governmental functions. National banks are important instrumentalities of the United States and are not in a class with many corporations which perform for it only limited or special services.

The National Bank Act of June 3, 1864, provided for the organization of national banks with private capital. At least 30% of the capital of the banks was required to be invested in Government bonds and transferred to the Treasurer of the United States, against which he was authorized to issue to the banks circulating notes equal to 90% of the par value of the bonds, but not in excess of their market value. Though nominally issued by the banks and bearing their names, the national bank notes were Government paper money.

The Federal Reserve Act of 1913 created a system of banks to operate under the direct control of the Government through a Board of Governors appointed by the President. The national banks were required to

provide the capital for the Federal Reserve Banks, to have membership therein, and were given representation on their Boards of Directors. The Act was subsequently enlarged and amended, particularly in 1933 and 1935. It provides for the issuance of currency by the Federal Reserve Banks. By the process of retiring bonds of the United States which were eligible as security for bank notes, the Federal Reserve notes issued during and since 1933 have become the principal circulating currency, and the bank notes have been retired. *The provisions of the National Bank Act for the issuance of bank notes as circulating legal tender have not been repealed and may again appear to supplement and enlarge the present currency if the need should arise by the issuance of Government bonds eligible for their security.*

It requires no profound understanding of public finance to see the intricate and sensitive relation of the national banking structure to the fiscal policies of the Federal Government. The national banks are the foundation and the framework of the structure. If they were to disappear, the financial system of the United States would require reconstruction.

The national banks are important agencies and instrumentalities of the United States. Congress alone may determine the necessity for their existence; having spoken, its decision is not to be denied, nor its purpose defeated.

The Federal Reserve Act sought not only to provide an improved and responsive currency but went much deeper. It recognized that the essential diffi-

culty in American banking lay in its undue decentralization and consequent dissipation of strength. Fundamentally the Federal Reserve Act sought to give relief by changing the basic organization of the national banking system so as to provide for more centralization of the banking reserves and for more control of and supervision over banking. It created twelve Federal Reserve Banks, one in each of twelve Federal Reserve Districts, held together by a central body, designated the Federal Reserve Board. The Federal Reserve Banks were to be banker's banks; were not to engage in private business; and were to deal chiefly with their members and the Government. The purpose of the Federal Reserve Act is aptly stated in *United States v. Davenport,* 266 Fed. 425, as follows:

> *"The broad purpose of the Federal Reserve Act was to incorporate under federal control as members of federal reserve banks all national banks, as well as banks other than national banks. By force of the law, all national banks, though still national banks, are members of federal reserve banks.* National banks cannot exist and continue to operate alone as such within one year after the passage of the Federal Reserve Act of December, 1913, because of the mandate of the statutes." (Emphasis supplied.)

The Banking Act of 1933 created the Federal Deposit Insurance Corporation, the chief function of which is to insure the deposits of all banks which are entitled, as provided in the statute, to the benefits of insurance. The Banking Act of 1935 provided for the continuance of the Federal Deposit Insurance Corpo-

ration under the management of a board of three directors consisting of the Comptroller of the Currency and two members appointed by the President by and with the advice and consent of the Senate. Every national or state bank member of the Federal Reserve System operating August 23, 1935, must be and continue to be, an insured bank subject to the insurance-of-deposit provisions.

The national banks have become integral parts of a great system of government instrumentalities. They are public corporations. Without them the system could not function. If the Treasury Department and the Federal Reserve System and the Federal Deposit Insurance Corporation are instrumentalities of the United States, then national banks, as necessary parts of the whole integrated structure, are also its instrumentalties.

The principle that a corporation privately owned and operated for private profit may, nevertheless, be an agency and instrumentality of the United States, if the authority for its existence comes from the exercise by Congress of its constitutional power to create the agency or instrumentality, is further supported by the following recent decisions:

Ellingson v. Iowa Joint Stock Land Bank of Sioux City, Iowa, 264 N. W. 516 (1936);

Dallas Joint Stock Land Bank v. Ballard (Texas Civ. App. 1934), 74 S. W. (2d) 297, affirmed on appeal, 124 Texas 113, 76 S. W. (2d) 1042;

Smith v. Kansas City Title & T. Co. (1921), 255 U. S. 180, 41 S. Ct. 243, 65 L. ed. 577;

M. G. West Co. v. Johnson, 20 Cal. App. (2d) 95, 66 Pac. (2d) 1211; certiorari denied by the United States Supreme Court, 302 U. S. 638, 82 L. ed. 497, 58 S. Ct. 525;

Federal Land Bank v. Crosland, 261 U. S. 374, 43 S. Ct. 385, 67 L. ed. 703, 29 A. L. R. 1 (1923);

Nat. Newark etc. Bank v. Unemployment Comp'n (May, 1941), 126 N. J. 387, 19 Atl. (2d) 803;

Federal Land Bank v. Bismarck Lumber Co. (1941), 86 L. ed. 65, 314 U. S. 95.

In *Federal Land Bank v. Bismarck Lumber Co.,* supra, a lumber company sought to compel payment of a North Dakota sales tax on lumber sold to a Federal Land Bank for use in repairing buildings on land acquired by the bank through foreclosure. On certiorari this Court reversed a judgment of the local District Court of Burleigh County for payment of the tax. Mr. Justice Murphy said:

> "The argument that the lending functions of the federal land banks are proprietary rather than governmental misconceives the nature of the federal government with respect to every function which it performs. The federal government is one of delegated powers, and from that it necessarily follows that any constitutional exercise of its delegated powers is governmental. Graves v. New York, 306 U. S. 466, 477, 83 L. ed. 927, 931, 59 S. Ct. 595, 120 A. L. R. 1466. It also follows that when Congress constitutionally creates a corporation through which the federal government lawfully acts, the activities of such corporation are governmental. Pittman v. Home Owners' Loan

Corp., 308 U. S. 21, 32, 84 L. ed. 11, 16, 60 S. Ct. 15, 124 A. L. R. 1263; Graves v. New York, supra (306 U. S. 477, 83 L. ed. 931, 59 S. Ct. 595, 120 A. L. R. 1466).

* * * * * * *

"In support of their argument respondents rely on Smith v. Kansas City Title & T. Co., 255 U. S. 180, 65 L. ed. 577, 41 S. Ct. 243, supra, and Federal Land Bank v. Priddy, 295 U. S. 229, 79 L. ed. 1408, 55 S. Ct. 705, supra. In the Smith case we held that farm loan bonds, which might be secured by first mortgages accumulated in the course of the land banks' lending activities, could be exempted from state taxation. In the Priddy case, merely as an aid to the proper construction of Sec. 4 of the Federal Farm Loan Act giving the land banks the right to sue and be sued 'as fully as natural persons', we noted that the land banks possessed some of the characteristics of private business corporations. Their character as federal instrumentalities was specifically affirmed and the broad tax immunity granted to them was not questioned. * * *"

Whether or not other corporations created for a public purpose by Acts of Congress or with its permission are a part of the United States is not conclusive of the issues when we are concerned with national banks. It is necessary that we consider their peculiar relation to, and their particular operations under the control by the Treasury Department of the United States. The Act of June 3, 1864, which created the banks, also created the office of Comptroller of the Currency as a bureau in the Treasury Department. The Treasury Department is a branch of the Execu-

tive Department of the United States. It carries out and executes the fiscal policies and operations of the Government. If national banks operate in many respects as private corporations, they are, nevertheless, limited in the scope of their activities by the policies declared by Congress and effectively administered and put into effect by the Treasury Department. Their activities and operations are further limited and controlled by the Federal Reserve Board which is, admittedly, an arm of the Government. The Federal Reserve Board determines what reserves they must maintain and many other matters in keeping with the fiscal policies of the United States as they are changed from time to time to meet the varied conditions of a highly complex fiscal system. We do not conceive that for the purposes of a law like the National Labor Relations Act they are, or should be, any less exempt than the Treasury Department of the United States itself.

We further submit for consideration this fact: that Congress has always declared by what officers and departments of the Government the national banks are to be regulated and their operations controlled. It is also to be remembered that Congress has expressly provided that no national bank "shall be subject to any visitorial powers other than such as are authorized" by the National Bank Act "or are vested in the courts of justice". (U.S.R.S. 5241; Title 12 U.S.C.A., Section 165.)

The National Bank Act in all its particulars is, literally, an act for the regulation of national banks. Its express and exclusive provisions preclude any im-

plied intent to subject them to other regulatory laws without express provision or authority.

Fundamentally, we have here a conflict between the authority which the Board would assert, and the authority of other departments of the Government which are operating under, and whose authority comes from, laws in aid of the fiscal and monetary policies of the United States. The effect of a conflict of authority was considered by this Court in *Southern Steamship Company v. National Labor Relations Board* (1942), 316 U. S. 31. In that case the Steamship Company discharged seamen who had conducted a strike on board a vessel, docked in an American port, to compel the owner of the vessel to recognize their union which had been certified by the Board as a bargaining agent. The Board found that by discharging the seamen the shipowner had violated the Act. The employer resisted the order on the ground that the seamen were justifiably discharged because they had violated the Mutiny Statutes. (Crim. Code, Secs. 292, 293.) In ordering a remand of the case to the Board for modification of the order, this Court, by Mr. Justice Byrnes, said:

> "* * * It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task."

It has been repeatedly and consistently held by our Courts that national banks are corporations possessed of limited powers and that all powers not expressly or by implication granted by the provisions of the National Bank Act (Section 24, Title 12, Chapter 2, U.S.C.A.) are deemed denied. For example, this Court held in *Easton v. Iowa,* 47 L. ed. 452, 188 U. S. 220, that:

> "* * * Congress having the power to create a system of national banks is the judge as to the extent of the powers which should be conferred upon such banks, and has the sole power to regulate and control the exercise of their operations."

National banks have only such powers as are expressly granted or necessarily implied from specific grants, and every power not clearly granted must be regarded as withheld and prohibited. (*People ex rel. etc. v. Cairo-Alexander County Bank,* 363 Ill. 589, 2 N. E. (2d) 889; *O'Connor v. Bankers Trust Co.,* 159 Misc. 920 (N. Y.), 289 N. Y. S. 252.) The measure of their powers is the statutory grant, and all powers not conferred are denied. (*First National Bank v. Nat. Exch. Bank,* 92 U. S. 122, 23 L. ed. 679; *Logan County Nat. Bank v. Townsend,* 139 U. S. 67, 35 L. ed. 107; *California Bank v. Kennedy,* 167 U. S. 362, 42 L. ed. 198; *First Nat. Bank of Concord v. Hawkins,* 174 U. S. 364, 43 L. ed. 1007; *First Nat. Bank v. Converse,* 200 U. S. 425, 50 L. ed. 537; *Bullard v. Nat. Eagle Bank,* 85 U. S. 589, 21 L. ed. 923.)

The Act under which national banks are organized constitutes a complete system for their government. (*Cook County Nat. Bank v. U. S.,* 107 U. S. 445, 448,

27 L. ed. 537.) Anyone dealing with a bank is charged with notice of those powers and cannot plead ignorance thereof. (*Mech. Bank v. Bank of Columbia,* 5 Wheat. 326, 5 L. ed. 100; *U. S. v. City Bank of Columbus,* 21 How. 356, 16 L. ed. 130; *Salem Bank v. Gloucester Bank,* 17 Mass. 1; *Healey v. Stewardson Nat. Bank,* 285 Ill. App. 290, 1 N. E. (2d) 858.)

It is well settled that a national bank has no power to enter into contracts not incidental to its banking business. It cannot subscribe to a public or private enterprise. (*Robertson v. Buffalo County Nat. Bank,* 40 Neb. 235, 58 N. W. 715. See also *Dresser v. Traders' Nat. Bank,* 165 Mass. 120, 42 N. E. 567; *Wylie v. Northampton Nat. Bank,* 15 Fed. 428; *Norton v. Bank,* 61 N. H. 589; *Nat. Bank v. Atkinson,* 55 Fed. 465.) The contract of a national bank, to be valid, must have a natural and reasonable tendency to aid in the accomplishment of the objects for which the bank was created. (*Exchange Bank of Ft. Worth v. Hensley and Roland,* 240 S. W. 679 (Tex.).) Nor can a national bank enter into contracts which will subject it to periodical examination by private representatives. (27 Op. Atty. Gen. 324 (1909).) Any contract which gives away the control over the naming of officers and directors of a national bank is *ultra vires.* (*Clark v. Boston-Continental Nat. Bank,* 9 F. S. 81; *West v. Camden,* 135 U. S. 507, 34 L. ed. 254; *Sherman & Ellis v. Indiana etc. Co.,* 41 F. (2d) 588; *Hellier v. Achorn,* 255 Mass. 273, 151 N. E. 305.)

An examination of the powers given by the National Bank Act to a national bank, when considered in the light of the requirements of the National Labor Rela-

tions Act, leads one inevitably to the conclusion that Congress could not have intended to subject a national bank to the requirements of that Act, but on the contrary, that by exempting the United States from its jurisdiction it intended to include national banks in such exemption.

For example, in Section 8(5) of the Act, it is declared to be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).

It has been held that "to bargain collectively" means to bargain in good faith, and that when a meeting of the minds has been reached between the representatives of the employees and the employer it is an unfair labor practice for the employer to then refuse to reduce such agreement to writing. It will follow that if a national bank is an employer within the meaning of the Act, it must be prepared, and it will be held an unfair labor practice if it refuses, to enter into a written agreement with the representatives of its employees embodying the understanding reached between them pursuant to collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of work. If the subsequent operation of the contract should result in such losses to, or impairment of, the bank as to destroy its usefulness, would the Comptroller of the Currency, or the Board of Directors of the Federal Reserve System, or the Board of Directors of the Federal Deposit Insurance Corporation have any power to intervene? Would they, or any of them, have the right to order the

contract terminated and to force the bank to commit an unfair labor practice? Here we have an irreconcilable conflict between two arms of government. The arm of the government having for its function the supervision and protection of the national banks will claim that the contract of the bank entered into with its employees pursuant to the requirements of the National Labor Relations Act must be abrogated if the bank is to continue in operation. The Board, whose function is to administer the Act, will claim that if the bank should abrogate the contract it would be engaging in an unfair labor practice, subjecting it to the penalties of that statute.

In whom, under such conditions, does the paramount authority to regulate the business of banking rest? Is it in the Comptroller of the Currency and the other fiscal arms of the United States as a sovereign, to be exercised for the protection of the government, or did the Congress intend by this legislation to burden one of its most important instrumentalities? In construing the statute it is reasonable to assume that when the Congress said that the Labor Act should not apply to the United States, it meant to include without express provision to that effect, any agency and instrumentality of such character as a national bank.

We submit that whether or not an instrumentality of the United States is excepted as an employer under the Act, because the United States is excepted, should depend upon and be determined by the particular nature and character of the agency, and that any doubt should be resolved in favor of the exclusion where, to hold otherwise, would conflict with or defeat a more

important end and object of the Government in creating the national banks under the exercise of another power.

What we have last said on this subject adds emphasis to what we have said on the commerce question. In searching the Labor Act for its intent, and the banking laws for their intent, it seems to us that the two questions are interrelated. Since Congress did not, by appropriate provisions in the Labor Act, meet the obvious conflict between these laws, then we must believe that Congress did not conceive, in the first instance, that the activities of the national banks would be held to be commerce. We think that conclusion is the rational one and that the only decision which will adequately solve the problem is that the Board is without jurisdiction over national banks under the commerce clause.

The question is federal in character and should be decided by this Court.

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3. THE DUE PROCESS QUESTION.

During the trial petitioner applied to the Trial Examiner for a *subpoena duces tecum* to require the attendance of witnesses and the production of evidence in their possession. Several of the discharged employees of petitioner were under examination as witnesses for the Board and the main purpose of the application was to obtain as evidence written statements made to the Board by the complaining employees shortly after their discharge and two years or

more before the trial, on the ground that their prior written statements would contain a more accurate disclosure of the events bearing upon their discharge than their oral testimony more than two years later. (R. 1307-1321.) The written statements were material and admissible to test the credibility of the witnesses who made them and for purposes of impeachment. (*Wigmore on Evidence*, Second Edition, Sec. 17, et seq.)

The Board also had in its possession memoranda of discussions and correspondence with petitioner during the two year period prior to the filing of the complaint which indicated that the Board would be willing to drop the charge that the discharge of the automotive messengers was discriminatory if petitioner would re-employ one John E. Devine, whose complaint that his discharge was discriminatory was also on trial.[2] The application for the subpoena also sought a disclosure of this correspondence to test the good faith of the Board on issues made by petitioner's answer to the complaint. (R. 315-316.)

The Trial Examiner denied the application for the subpoena ruling as follows:

> "At this time the Trial Examiner is going to deny the respondent's right to a subpoena duces tecum, and is also going to strike from the answer the third and fourth further and separate answers of the respondent on the grounds that they are no defense to the action here involved." (R. 1321.)

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[2]The Trial Examiner found that John E. Devine was discriminatorily discharged and ordered his reinstatement. The Board reversed his finding and held that his discharge was for cause and was justified. (R. 173.)

The right of a litigant to produce witnesses and to offer evidence is fundamental and is a requirement of due process. The right of subpoena to compel the attendance of witnesses and to obtain the evidence is included in the requirement of due process.

In *Morgan v. U. S.*, 304 U. S. 1, 18, this Court said:

> "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them."

In *Donnelly Garment Co. v. N. L. R. B.*, 123 Fed. (2d) 215 (November 6, 1941), the Circuit Court of Appeals in the Eighth Circuit said:

> "That a refusal by an administrative agency such as the National Labor Relations Board to receive and consider competent and material evidence offered by a party to a proceeding before it, amounts to a denial of due process is not open to debate. See St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 73, 56 S. Ct. 720, 80 L. Ed. 1033; Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U. S. 292, 304-305, 57 S. Ct. 724, 81 L. Ed. 1093; Railroad Commission v. Pacific Gas & Electric Co., 302 U. S. 388, 393, 58 S. Ct. 334, 82 L. Ed. 319; Morgan v. United States, 304 U. S. 1, 14, 15, 58 S. Ct. 773, 999, 82 L. Ed. 1129. * * *
>
> "Our conclusion is that the petition of the Board for enforcement of the order under review must be denied. We think that the least that the Board can do, in order to cure the defects in its procedure caused by the failure of the Trial Examiner to receive admissible evidence, is to

vacate the order and the findings and conclusions upon which it is based; to accord to the petitioners an opportunity to introduce all of the competent and material evidence which was rejected by the Trial Examiner; and to receive and consider such evidence together with all other competent and material evidence in the record before making new findings and a new order.

"Because of lack of due process in the proceedings before the Board, the question of the sufficiency of the evidence to support the findings and order will not be considered. * * *"

It matters not that the witnesses, when they appear, may not testify, or that the evidence, when offered, may not be material. Admissibility and relevancy of the evidence are matters to be determined when the evidence is offered. In this case the Trial Examiner ruled the evidence out before it was offered and before he could have known its nature or effect. He went farther by denying process to obtain the evidence. It was a denial of due process of law and is a federal question which this Court alone may now consider and review.

Not only was the denial of the particular subpoena in this case a failure of due process, but the rule of the Board and its practice in relation to subpoenas is in itself discriminatory and lacking in the quality of equal rights and protection under the Constitution.

The Board automatically grants to its own agents and attorneys any subpoena requested, but demands and exacts an application therefor from any respondent, and a showing of what is sought to be proved and

its materiality. The Trial Examiner then undertakes to pass upon the materiality prior to the production of the witness or the documents which may be sought. (Article II, Section 21, Rules of Board.) This rule was condemned in *Inland Steel Co. v. National Labor Relations Board* (1940), 109 Fed. (2d) 9. In that case the Court held that the rule amounted to a substantial denial of due process and in speaking of the rule and its operation stated:

> "It also illustrates, in a minor fashion, what this record, as a whole, convincingly discloses—that is the danger of imposing upon a single agency the multiple duties of prosecutor, judge, jury and executioner. The further assumption that the ruling of the Trial Examiner was in compliance with the Board's rule, does not improve the situation—it merely shows *the rule itself is unfair and discriminatory.* * * *
>
> "It is further argued by the Board that petitioner's complaint is without merit because there is no showing that evidence favorable to it was excluded. This argument begs the question. *We are not now considering the extent to which petitioner was prejudiced, but whether it was, by such procedure, deprived of a substantial right, or whether the procedure employed placed it at a disadvantage in contrast with its opponent. It is also argued that the rule is reasonable because petitioner, under Section 10(e) of the Act, has a right to make application to this court to adduce additional evidence. This argument also is not tenable. Such provision has no bearing upon what we regard as an unreasonable and unfair restriction upon petitioner's right to the process of subpoena.*" (Emphasis supplied.)

The case is referred to and approved in a note in 53 *Harvard Law Review* (1940), 842, where it is stated:

> "Seemingly the NLRB rule castigated in this case did not meet the elementary test of fairness, since in a proceeding where the issue was largely the determination of important private rights, a burden was placed on one party to which the other was not subject. In contrast is the practice of the FTC, which, though also combining the multiple role of prosecutor-judge-jury, issues ordinary subpoenas freely on the sole condition that the party pay expenses, and is equally lenient in accepting averments of materiality and relevancy as conditions precedent to the issuance of subpoenas duces tecum upon defendant's written application. Even taking into account differences in the nature of the two agencies, the fact that the FTC has functioned since 1914 without being unduly encumbered by virtue of its liberal policy rebuts in part the NLRB's convention that the restrictive rule which now governs the issuance of its subpoenas is necessary for an efficient administration of its duties."

The question of due process inherent in this situation is also a federal question and should be reviewed by this Court.

The conflict between the decision of the Circuit Court of Appeals in the instant case and the decisions in the other Circuits also requires a review by this Court.

Wherefore, it is respectfully submitted that this Court should reconsider its denial of the petition for

a writ of certiorari herein and that the writ should issue on the grounds we have herein stated.

Dated, San Francisco, California,
May 10, 1943.

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CERTIFICATE OF COUNSEL.

I hereby certify that I am one of the petitioner's counsel in the above-entitled cause and that, in my judgment, the foregoing petition is well founded in law and in fact, and that said petition is not interposed for delay.

Dated, San Francisco, California,
May 10, 1943.

HERBERT W. ERSKINE,
Counsel for Petitioner.